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UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

DENNIS BUONANOMA,

Plaintiff,

vs.

SIERRA PACIFIC POWER COMPANY,

Defendant.

Case No. 3:04-cv-00077-LRH-VPC

**DEFENDANT SIERRA PACIFIC POWER
COMPANY'S FIRST SET OF MOTIONS *IN*
*LIMINE***

Defendant SIERRA PACIFIC POWER COMPANY (hereinafter referred to as "SPPC"), hereby moves this Court for orders *in limine* to exclude the following evidence and witnesses from trial:

- 1) Any evidence from witnesses and documents not disclosed prior to the close of discovery or pursuant to Rule 26.
- 2) Any evidence or argument concerning statements by SPPC to the EEOC.
- 3) Any evidence or argument concerning an alleged "secret" file or that SPPC violated NRS 613.075.
- 4) Any evidence or argument pertaining to a dismissed claim or a proposed claim not allowed by the Court.

- 1 5) Any evidence or argument concerning statements made by Mercer Consulting
- 2 Company, an alleged "Mercer method," and any evidence of payments made by
- 3 SPPC to Mercer.
- 4 6) Any evidence or argument related to a failure to promote claim by Buonanoma and
- 5 resulting damages.
- 6 7) Any evidence or argument of discrimination complaints or lawsuits by other
- 7 employees, or compromise negotiations between SPPC and other employees or an
- 8 agency.
- 9 8) Any evidence that Buonanoma has been unable to find employment because
- 10 prospective employers "Google" his name and learn that he filed the instant lawsuit,
- 11 in addition to Buonanoma's speculation that there is a stigma related to leaving
- 12 SPPC.
- 13 9) Any evidence related to Buonanoma's claim for economic damages.
- 14 10) Any evidence of SPPC's net worth until after Buonanoma proves a *prima facie* claim
- 15 for punitive damages.

16 This Motion is filed in compliance with Local Rule 16-3(b) and the Pretrial Order filed by the

17 parties on November 30, 2009, and executed by this Court on December 4, 2009. This Motion is

18 based upon the accompanying Memorandum of Points and Authorities, the exhibits attached

19 hereto, all pleadings and papers on file herein, as well as any oral argument that this Court may

20 entertain.

21 **MEMORANDUM OF POINTS AND AUTHORITIES**

22 **I. INTRODUCTION**

23 This case involves Buonanoma's claims for gender and age discrimination based upon

24 SPPC's decision to remove Buonanoma from his position as Team Leader, Support Services, and

25 terminate him one year later. SPPC denies Buonanoma's allegations that he was discriminated

26 against. SPPC further contends that Buonanoma was not satisfactorily performing in the Team

27 Leader position.

28 ///

1 SPPC files the following motions *in limine* to exclude certain evidence that it believes
 2 Buonanoma will attempt to present at the trial in this matter scheduled to begin on September 21,
 3 2010. Because such evidence is improper for the reasons set forth below, SPPC requests an order
 4 *in limine* excluding such.

5 **II. LEGAL ARGUMENT**

6 **A. General Principles Concerning Motions *In Limine*.**

7 It is well-settled that a trial court has the inherent power to entertain and grant a motion *in*
 8 *limine*. See LR 16-3(b). A district court's inherent powers include the "broad discretion to make
 9 discovery and evidentiary rulings conducive to the conduct of a fair and orderly trial." *Unigard*
 10 *Security Ins. Co. v. Lakewood Engineering & Mfg. Corp.*, 982 F.2d 363, 368 (9th Cir. 1992) (quoting
 11 *Campbell Indus. v. M/V Gemini*, 619 F.2d 24, 27 (9th Cir. 1980)). Motions *in limine* help resolve
 12 critical evidentiary issues at the outset to enhance the efficiency of the trial process. *Civil Trials and*
 13 *Evidence* § 4:319 (Jones and Rosen 2007). A party may make a motion *in limine* requesting the
 14 exclusion of specified evidence or argument and base the motion on any grounds available under
 15 the Federal Rules of Evidence. *Moore's Manual: Federal Practice and Procedure* § 18.24[8] (Moore,
 16 Vestal and Kurland 2001).

17 **B. Motion To Exclude Undisclosed Witnesses And Documents.**

18 Defendant SPPC moves, *in limine*, to preclude Plaintiff Dennis Buonanoma and his counsel
 19 from introducing testimony from witnesses and documentary evidence not disclosed by January 6,
 20 2005, the discovery deadline, or pursuant to Rule 26. This motion is made on the grounds that
 21 several of the witnesses identified in Plaintiff's portion of the Joint Pretrial Order were not
 22 previously identified and hundreds of documents were not produced with Plaintiff's disclosures or
 23 discovery responses. Plaintiff was obligated to identify these persons and produce these
 24 documents, but he failed to do so. Plaintiff's decision to withhold disclosure of the identity of such
 25 persons and certain documents until 2009 (over four years after discovery closed) is highly
 26 prejudicial to Defendant and justifies the exclusion at trial of these witnesses and documents.

27 Plaintiff has identified numerous witnesses in his portion of the Joint Pretrial Order. Review
 28 of both parties' disclosure statements and discovery responses confirms that the witnesses listed

below were never previously identified in Plaintiff's disclosures or discovery responses. **Exhibit A (Plaintiff's and Defendant's initial disclosures); Joint Pretrial Order, Doc. No. 129.**

Gerald Mikesell, Esq. (former SPPC in-house counsel)
 Donna LaMonte (SPPC employee)
 Suzanne Brown (former SPPC employee)
 Sarah Britt (former SPPC employee)
 Rod Sloan (former SPPC employee)
 Rachel Bixby (current SPPC employee)
 Ralph Negron (current SPPC employee)

Plaintiff also did not disclose these individuals in response to SPPC's interrogatory asking Plaintiff "If any person has relevant information concerning the allegations contained in Plaintiff's Complaint and if that person has not been previously identified in your answers to the above interrogatories, then provide Defendants with the relevant information including the person's name, address...."

Exhibit B (Plaintiff's Answers to Interrogatories). Despite a continuing obligation to supplement interrogatory answers, Plaintiff neglected to do so within the discovery period.

The following documents were never previously identified or disclosed with Plaintiff's disclosures or discovery responses:

Plaintiff's job search documents. B093-B0658
 Buonanoma's Weekly Reports to Supervisor Angela Branch. B001-092
 Award plaque given to Buonanoma for enthusiasm.
 SPPC Expert Report from Andreini/Belles case.
 Resume of Rod Sloan.
 Resume of Sarah Britt.
 Resume of Ralph Negron.
 Payroll records of Mitch Andreini.
 SPPC "Employee Information Manual" dated 1988.

Plaintiff disclosed documents B1-658 more than four years after the close of discovery, on September 1, 2009. **Exhibit C (letter from Vohl referring to job search documents dated August 28, 2009).** The remaining documents listed above have *never* been disclosed, and even as of today's date, Plaintiff has not produced these documents.

Rule 26 obligates the parties to disclose, among other things, "the name...of each individual likely to have discoverable information that the disclosing party may use to support its claims or defenses" as well as "all documents...that the disclosing party may use to support its claims or defenses, unless solely for impeachment." Fed. R. Civ. P. 26(a)(1). Rule 26 also requires a party to timely supplement his disclosures and responses. Fed. R. Civ. P. 26(e). Local Rule 16-3(c)(11)

1 pertaining to the list of witnesses to be identified in the Joint Pretrial Order specifically provides,
2 "such list may not include witnesses whose identities were not but should have been revealed in
3 response to permitted discovery unless the court, for good cause and on such conditions as are
4 just, otherwise orders." If a party fails to disclose information in accordance with Rule 26(a), that
5 party "shall not, unless such failure is harmless, be permitted to use as evidence at a trial
6 any...information not so disclosed." Fed. R. Civ. P. 37(c)(1); *Loux v. State of Nevada, Dep't of*
7 *Welfare*, 2007 U.S. Dist. LEXIS 21502 *2 (D. Nev. 2007).

8 In the present case, the witnesses identified above were not disclosed timely, and
9 Defendant had no opportunity to depose those individuals as a result. The first time that many of
10 these witnesses were identified is in Plaintiff's Proposed Pretrial Order, and other individuals listed
11 above were identified in correspondence from Plaintiff's counsel in 2009, four years after the close
12 of discovery in January 2005. Plaintiff must have "substantial justification" for failing to timely
13 disclose these witnesses. There is none. Plaintiff has no excuse for failing to identify these
14 witnesses until more than four years after the close of discovery, after Defendant's summary
15 judgment motion was granted, and after the appellate proceedings in the Ninth Circuit Court of
16 Appeals. For example, Plaintiff alleges that Rod Sloan should have been promoted to Team Leader,
17 rather than Joanne Osborne, in May 2004 – nine months prior to the close of discovery. Defendant
18 anticipates that Plaintiff will contend that Rod Sloan, Suzanne Brown, and Sarah Britt were also
19 discriminated against based upon age. Defendant has no other information about their purported
20 testimony. There is no excuse for Plaintiff's blatant failure to notify SPPC before the discovery
21 deadline that these employees would be identified as individuals with knowledge by Plaintiff. There
22 is also no excuse for Plaintiff's failure to notify SPPC years ago of any of these contentions.
23 Plaintiff's hide the ball tactics should not be rewarded.

24 Additionally, testimony by these witnesses is irrelevant, and any potential relevance is
25 outweighed by the danger of confusion of issues, undue delay and waste of time. Fed. R. Evid.
26 401, 403. Plaintiff will contend that Rod Sloan was discriminated against in 2004, *two years* after
27 Plaintiff's termination, that Suzanne Brown was discriminated against in 2008, *six years* after
28 Plaintiff's termination, and that Sarah Britt was discriminated against in 2006, *four years* after

1 Plaintiff's termination. These events are too remote in time from, and occurred years after, the
 2 alleged discrimination in this case. Ralph Negron was hired for the Team Leader, Facilities position
 3 in 2006, and therefore, any testimony by Mr. Negron has absolutely no relevance to this case since
 4 Plaintiff was terminated in 2002, Plaintiff was never employed in that position, and Plaintiff is not
 5 contending that he should have been awarded that position rather than Mr. Negron. Rachel Bixby
 6 became a Services Coordinator in the Facilities Department in November 2007, which is not in any
 7 way relevant to Plaintiff's termination from a position in the Support Services Department five years
 8 earlier. Also, Angela Branch, Plaintiff's supervisor, played no role in the employment decisions
 9 affecting Brown, Britt, Negron or Bixby. *See Loux v. State of Nevada, Dep't of Welfare*, 2007 U.S.
 10 Dist. LEXIS 21502 *3-4 (D. Nev. 2007); *Guinan v. Potter*, 307 Fed. Appx. 92, 2009 U.S. App. LEXIS
 11 2391 *2-3 (9th Cir. 2009). Their resumes, which were identified for the first time in the Joint
 12 Pretrial Order, and have never been produced, are likewise irrelevant and prejudicial. **See Joint**
 13 **Pretrial Order, p. 9, Plaintiff's Exh. 11, 12, and 13.** Plaintiff's attempts to try other former
 14 employees' cases in this trial should be shut down.

15 With respect to Mr. Mikesell and Ms. LaMonte, Defendant anticipates that Plaintiff intends to
 16 introduce their testimony concerning statements they made to the EEOC prior to the filing of the
 17 lawsuit. *See* Plaintiff's Exh. 15.¹ Plaintiff identified the following as an "Issue of Fact" for trial in
 18 the Joint Pretrial Order: "Did SPPC knowingly provide false information to the EEOC to provide a
 19 pretext for the termination?" Any testimony by these witnesses is inadmissible pursuant to Fed. R.
 20 Evid. 502 because it is barred by the attorney-client privilege and/or work product doctrine, and

21
 22 ¹ On February 1, 2005, Plaintiff filed a second motion to amend his Complaint to assert defamation and fraud
 23 claims against SPPC, Defendant's former attorney of record in this litigation, Gerald L. Mikesell, Esq., and
 24 Jacqueline Kirkland, involving a statement made by SPPC in defending against Plaintiff's charge of
 25 discrimination before the Equal Employment Opportunity Commission ("EEOC"). *See*, Plaintiff's Motion for
 26 Leave to File Second Amended Complaint filed 2/1/05, Document No. 28. The Court denied Plaintiff's motion,
 27 and sanctioned Plaintiff's counsel because the proposed claims violated Rule 11. Specifically, the Court found
 28 that the proposed claims lacked evidentiary support and were not warranted by existing law or by non-
 frivolous arguments for the extension of law. *See*, Minutes of the Court dated 6/9/05, Document No. 75;
 Minutes of the Court dated 6/30/05, Document No. 78; Order filed 2/14/06, Document No. 100; Order filed
 6/6/06, Document No. 104. Plaintiff did not appeal the Court's Order denying his motion for leave. Plaintiff's
 counsel appealed the Court's award of sanctions against her. The Ninth Circuit affirmed the award of
 sanctions stating "the district court determined that the first two claims [fraud and defamation] were barred
 by the litigation privilege." *See*, Memorandum filed 4/29/09, Document No. 112; Order on Mandate filed
 6/8/09, Document No. 114.

1 their statements to the EEOC are irrelevant, inadmissible hearsay, and they are absolutely
 2 privileged. Fed. R. Evid. 401, 403, 408; 42 U.S.C. 2000e-5(b). In particular, allowing Plaintiff to
 3 introduce such evidence concerning counsel's observations, beliefs, and mental impressions about
 4 the case would violate the very essence of the attorney work product doctrine. Further,
 5 representations to the EEOC are absolutely privileged. *Lisowski v. Davis*, 312 B.R. 681, 689-90 (D.
 6 Nev. 2004), *citing, Circus Circus Hotels v. Witherspoon*, 99 Nev. 56, 657 P.2d 101, 104 (1983) (the
 7 absolute privilege attached to judicial proceedings has been extended to quasi-judicial proceedings
 8 before executive officers, boards, and commissions); *Sahara Gaming Corp. v. Culinary Workers*
 9 *Union Local 226*, 115 Nev. 212, 218, 984 P.2d 164 9199) (the absolute privilege rule applies to
 10 letters written in anticipation of litigation).

11 Defendant's expert report disclosed *in another case* is obviously irrelevant and prejudicial
 12 pursuant to Fed. R. Evid. 401 and 403, and hearsay pursuant to Fed. R. Evid. 802. The report
 13 should also be excluded because Plaintiff violated Rule 26(a)(2) and LR 26-1 by failing to identify
 14 this expert or produce the report by the expert disclosure deadline. To date, Plaintiff has still not
 15 identified this expert, having only identified the report as an exhibit in the Joint Pretrial Order.

16 This evidence would result in numerous mini-trials that are irrelevant and are substantially
 17 outweighed by the danger of unfair prejudice, undue delay and waste of time. Finally, due to the
 18 late identification of these witnesses and documents, *no discovery* has been conducted on any of
 19 the alleged testimony by these witnesses or the documents. Defendant would suffer great
 20 prejudice if these witnesses and documents were permitted in to evidence at trial as Plaintiff
 21 purposefully deprived Defendant of the opportunity to depose those individuals or conduct follow-
 22 up discovery, which may have altered the course of this case. Defendant respectfully requests
 23 that the Court exclude these witnesses from testifying at trial and exclude admission of the
 24 documents.

25 GRANTED: _____

DENIED: _____

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C. Motion To Exclude Any Argument Or Evidence Concerning Statements Made By SPPC To The EEOC.

As previously stated, Plaintiff intends to present the following issue at trial: "Did SPPC knowingly provide false information to the EEOC to provide a pretext for the termination?" In addition to the testimony of Gerald Mikesell, Esq., and Donna LaMonte, which should be excluded as explained above, SPPC anticipates that Plaintiff will attempt to introduce testimony by Jacqueline Kirkland, former HR Manager, and Cathy Palmer, former Team Leader, on the same issue. Ms. Kirkland testified that she is aware of a mistake made by Ms. LaMonte in a submission to the EEOC. **Exhibit D (Kirkland's Depo.), pp. 132:22-134:20, 143:19-24; see also Exhibit E (Pena Depo.), p. 51:22-54:11; Joint Pretrial Order Plaintiff's Exh. 15.** Ms. Palmer testified that the individual she referred to in her comments to her performance appraisal was not Buonanoma, contrary to the information provided by SPPC to the EEOC. **Exhibit F (Palmer's Depo.), pp. 51:15-53:15; Exhibit G (Branch's Depo.), Vol. II, pp. 18, 31.** For the same reasons supporting exclusion of Gerald Mikesell, Esq. and Donna LaMonte's testimony, this testimony and the documents SPPC submitted to the EEOC should also be excluded. Plaintiff's attempts to introduce such evidence, despite the fact that his counsel has already been sanctioned by the Court, is an enormous waste of time and unbecoming and inappropriate.

The information contained in Plaintiff's EEOC file is irrelevant to the issues in this case, as Plaintiff asserts no claim concerning the processing of his EEOC charge, which was terminated when he requested the right to sue letter from the EEOC. Fed. R. Evid. 401. Plaintiff attempted to amend his Complaint to assert claims based upon the EEOC file, but his motion was denied, and Plaintiff's counsel was sanctioned for attempting to do so. Therefore, the contents of the EEOC file do not make any of the facts of consequence to the trial "more probable or less probable." See Fed. R. Evid. 401. Consequently, the information in the EEOC file should be excluded under Federal Rule of Evidence 402 because it is irrelevant to the claims at issue in this case. Even if the Court were to find the EEOC file somehow relevant (which SPPC adamantly disputes), such evidence should be excluded because its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue

1 delay, waste of time, or needless presentation of cumulative evidence. Fed. R. Evid. 403. The file
 2 is also hearsay and absolutely privileged, and it contains information protected by the attorney-
 3 client and work product privileges. Fed. R. Evid. 502, 802; *see also* Fed. R. Evid. 408; 42 U.S.C. §
 4 2000e-5(b). There are plainly a myriad of reasons to exclude such evidence and Defendant
 5 respectfully requests that its motion *in limine* be granted as to this issue.

6 GRANTED: _____

DENIED: _____

7 **D. Motion To Exclude Any Reference To Or Evidence Concerning An Alleged**
 8 **"Secret" File Or Violation Of NRS 613.075.**

9 In the Joint Pretrial Order, Plaintiff included the following as an "Issue of Law": "Did SPPC
 10 violate NRS 613.075 when it maintained a secret file of Buonanoma in order to facilitate defends
 11 (sic) termination by building a 'case in termination'?" This issue has already been decided by the
 12 Court, and therefore, any reference to an alleged secret file or violation of NRS 613.075 should be
 13 excluded.

14 In his motion to file a second amended complaint filed on February 1, 2005, Plaintiff
 15 contended that "by keeping a 'secret' file concerning the Employee in violation of NRS 613.075, all
 16 defendants have willfully violated his rights protected under the laws of the State of Nevada."
 17 Plaintiff's Motion for Leave, Proposed Second Amended Complaint ¶ 51, Document No. 28.
 18 Plaintiff's motion was denied, and Plaintiff's counsel was sanctioned for attempting to bring the
 19 claim. Order entered 6/9/05, Document No. 75; Order entered 2/14/06, Document No. 100.
 20 Plaintiff objected to the award of sanctions pursuant to Fed. R. Civ. P. 72(a), and this Court
 21 affirmed the sanctions award and overruled Plaintiff's counsel's objections. Order filed 6/6/06,
 22 Document No. 104; *Buonanoma v. SPPC*, 2006 U.S. Dist. LEXIS 37318 (D. Nev. 2006). Plaintiff did
 23 not appeal the denial of his motion to amend. Plaintiff's counsel appealed the award of sanctions
 24 against her, and the Ninth Circuit Court of Appeals affirmed this Court's Order. Order entered
 25 4/29/09, Document No. 112; *United States v. Alpine Land and Reservoir Co.*, 27 F. Supp. 2d 1230,
 26 1237 (D. Nev. 1998) (on remand, the district court must proceed in accordance with the mandate
 27 and such law of the case as was established by the appellate court). In fact, counsel's attempt to
 28 reinsert this non-issue in to the trial is probably sanctionable conduct too. In any event, any

reference to an alleged violation of NRS 613.075 or "secret" file should be excluded and the motion in limine should be granted.

GRANTED: _____ DENIED: _____

E. Any Evidence Pertaining To Alleged Race Discrimination, Any Other Dismissed Claim, Or Any Proposed Claim Not Allowed By The Court Should Be Excluded.

Plaintiff's claims of race discrimination, violation of civil rights under § 1983, defamation, and intentional and negligent infliction of emotional distress were dismissed. *See* Order filed Sept. 21, 2005, Document No. 86. Plaintiff appealed the dismissal of his race discrimination claim, and the Ninth Circuit Court of Appeals upheld the district court's dismissal of the claim. Order entered April 29, 2009, Document No. 112. Plaintiff did not appeal the dismissal of the other dismissed claims listed above. In addition to the claim for violation of NRS 613.075, on February 1, 2005, Plaintiff filed a second motion to amend his Complaint to assert defamation, fraud, an intentional infliction of emotional distress claims based upon new allegations, and a claim for negligence/malpractice against former counsel for SPPC. *See* Plaintiff's Motion for Leave to File Second Amended Complaint filed Feb. 1, 2005, Document No. 28. The Court denied Plaintiff's motion, and Plaintiff's counsel was sanctioned for filing the motion with respect to many of the claims. *Buonanoma v. SPPC*, 2006 U.S. Dist. LEXIS 37318 (D. Nev. 2006). Accordingly, any evidence directly or indirectly relating to these claims should be excluded, including but not limited to evidence of the race of any employee. *See* Fed. R. Evid. 402 and 403.

GRANTED: _____ DENIED: _____

F. Motion In Limine To Exclude Statements By Mercer, A Consulting Company, An Alleged "Mercer Method," And Any Evidence Of Payments Made By SPPC To Mercer.

Plaintiff's apparent intentions on this issue are clearly improper. Plaintiff intends to introduce testimony from Patrizia Esse, a former accountant, concerning alleged statements made by a consulting company in 1993, 9 years prior to Plaintiff's termination. Of critical importance, these alleged statements *were not made by a SPPC employee*. Thus, SPPC requests an order excluding any argument or evidence concerning alleged age-related remarks made by the consulting

company, which were not made when Plaintiff was removed from the Team Leader position or when he was terminated, nor were they related to either event. Comments that are vague and remote in time to the employment decisions at issue are insufficient to establish discrimination and are, therefore, not probative. *Merrick v. Farmers Ins. Group*, 892 F.2d 1434, 1438 (9th Cir. 1990) (in age discrimination case, stray remark was insufficient to establish discrimination); *Nidds v. Schindler Elevator Corp.*, 113 F.3d 912, 918-19 (9th Cir. 1996) (comment that was uttered in an ambivalent manner and not tied directly to plaintiff's layoff was insufficient); *Nesbit v. PepsiCo, Inc.*, 994 F.2d 703, 704 (9th Cir. 1993) (general statement that did not relate to plaintiffs' termination was insufficient to create an inference of age discrimination).

Specifically, Esse testified that Roy Mercer referred to employees as "dead wood" in a team meeting for the reorganization. **Exhibit H (Esse Depo.), pp. 10:1-12:10.** She also testified that Mercer stated at that meeting that the "most expensive people are the people who have worked for the company the longest, the people who are working for the company the longest generally have a certain age." **Id. at p. 11:16-20.** Esse's testimony should be excluded. The comments were allegedly made at a meeting *in 1993* concerning the reorganization of Nevada Power Company, a Las Vegas-based company, that merged with Sierra Pacific Resources and *Defendant Sierra Pacific Power in 1999*. Esse claims that the comments were made by a *consultant*, who had no involvement or input in Plaintiff's termination, not an employee of SPPC, and they were not discussed at any meeting, other than the meeting in 1993, 9 years prior to Plaintiff's termination. **Id. at p. 21:13-20, 10:1-12:10, 13:25-14:4.²** However, Gloria Banks Weddle testified that Roy Mercer was a non-managerial, non-supervisory employee of Nevada Power Company, who worked in the IT department. **Exhibit I**

² *Mendelsohn v. Sprint/United Mgmt. Co.*, 587 F. Supp. 2d 1201, 1219 (D. Kan. 2008) (alleged age-related statements by consultant were properly excluded because they were "not relevant or had only the tiniest degree of relevance," and "would have resulted in mini-trials and would have created confusion and waste of time"); *Knowles v. Trans Union LLC*, 2005 U.S. Dist. LEXIS 30957 *31 (N.D. Ill. 2005) (alleged racial comments by consultant were not probative of discrimination because the consultant did not have input in the termination decision nor were they made near the time of plaintiff's termination); *Tiemeyer v. Quality Publishing, Inc.*, 144 F. Supp. 2d 727, 735 (S.D. Tex. 2001) (comment by consultant was not competent evidence of age discrimination because there was no evidence that consultant played any role in the plaintiff's termination or replacement); *Betkerur v. Aultman Hosp. Ass'n*, 78 F.3d 1079, 1097 (6th Cir. 1996) (statement in outside consultant's report did not create an issue of fact because there was no evidence that the statement was adopted or relied on by the decisionmakers); *Crawford-Mulley v. Corning Inc.*, 194 F. Supp. 2d 212, 220 (W.D.N.Y. 2002) (hearsay statement of outside consultant inadmissible and did not create a triable issue of fact; it was the perception of the decision-maker, not of an outside consultant, that was relevant).

1 **(Weddle Depo.), p. 62:6-13.** Esse also testified that she does not know of anyone that adopted
 2 the process, and to the contrary, she thinks that one leader rejected the process. **Exhibit H (Esse**
 3 **Depo.), pp. at p. 35:8-19.** Esse testified that Nevada Power Company determined *not* to implement
 4 Mercer's suggestions in this regard. ***Id.* at pp. 15:22-19:2.** Neither Branch nor Meyer were on the
 5 committees that met with Mercer, and Plaintiff has no evidence that they ever adopted or used the
 6 principle. ***Id.* at pp. 15:5-14, 20:24-21:12.** Esse also testified to an alleged comment by an
 7 undisclosed manager that there was "something called the Mercer method." ***Id.* At pp. 45:11-**
 8 **46:16.** Her testimony is irrelevant, speculative, and hearsay and should be excluded. Fed. R. Evid.
 9 402, 802, 602.

10 Additionally, Plaintiff admits that the comments were made in 1993, several years prior to
 11 employment decisions at issue. **Exhibit J (Plaintiff's Depo.), pp. 10:1-12:10, 13:25-14:4.** He
 12 admits that Mercer is a consulting company, and therefore, the comments were not made by an
 13 employee of SPPC. ***Id.* at p. 161:16-17.** Plaintiff admits that Mercer's task was to review
 14 departmental procedures and determine whether they could be more efficient, but that he does not
 15 know what Mercer actually did. ***Id.* at pp. 162:1-5; 162:24-163:1.** Plaintiff admits that he has
 16 no evidence that an alleged "Mercer method" was applied to him, admitting that he was not given
 17 more duties than he thought he could handle, and in fact, the amount of work that he was
 18 responsible for was *less* after the merger when he worked in the Team Leader position. ***Id.* at pp.**
 19 **155:7-9, 78:1-3.** Thus, these alleged comments are at best "stray remarks." Testimony and
 20 documents involving these remarks or discussing the reorganization process should plainly be
 21 excluded. **Joint Pretrial Order, Plaintiff's Exh. 34, 35, 36, 37;** Fed. R. Evid. 402, 602, 802.
 22 Additionally, any argument concerning an alleged "corporate goal of getting rid of older workers," and
 23 that "older employees [were] given heavier work assignments" should be excluded too. **Joint**
 24 **Pretrial Order, p. 4(I) and (m).**

25 The Ninth Circuit held in *Pottenger v. Potlatch Corp.*, 329 F.3d 740, 746 (9th Cir. 2003), that the
 26 management committee's use of the term "deadwood" does not suggest age discrimination. The
 27 court defined "deadwood" as "a person or thing regarded as useless or unprofitable; a hindrance or
 28 impediment," which is not associated with age. *See also EEOC v. Clay Printing Co.*, 955 F.2d 936, 942

(4th Cir. 1992), *rev'd on other grounds*, 311 F.3d 1253 (10th Cir. 2002) (reference to "deadwood" does not show discriminatory animus).

The alleged comments by the consultant are even further removed and remote in time from the employment decisions in this case than the type of comments that have been repeatedly found to be insufficient by the Ninth Circuit Court of Appeals. *Waizmann v. SPPC*, 291 Fed. Appx. 106, 2008 U.S. App. LEXIS 18214 *3 (9th Cir. 2008) (stray remarks that were uttered in an ambivalent manner and were not tied directly to plaintiff's termination were insufficient to establish pretext); *Copeland v. Ryder Serv. Corp.*, 323 Fed. Appx. 490, 2009 U.S. App. LEXIS 5607 *5-6 (9th Cir. 2009) (stray remarks were insufficient evidence from which a fact finder could conclude that plaintiff's termination was motivated by age).

SPPC also anticipates that Plaintiff will attempt to produce evidence of alleged comments by Mercer made in late 2001 to 2002. Plaintiff contends that Mercer used the term "low-hanging fruit," which he claims somehow evidences age discrimination. **Exhibit K (Snow Depo.), pp. 10:19-13:21; Joint Pretrial Order, Plaintiff's Exh. 20, bates-stamp no. 2300, 2304; Plaintiff's Exh. 22, bates-stamp no. 2280-2283, attached as Exhibits L and M.** Snow testified that "low hanging fruit" means "things that you can get after easily because they're right in front of you," and "pretty easy in order to implement." *Id.* She also testified that the comment did *not* relate to personnel issues. *Id. at p. 13:17-21.* In a presentation prepared by Mercer, Mercer states with respect to "low-hanging fruit," "change practice or process quickly and begin implementation as soon as possible." **Plaintiff's Exh. 20, doc. 2304, attached as Exhibit L.** There is no evidence that this presentation had any impact on Buonanoma's employment, or that any of the decision-makers were involved with or attended that presentation. Buonanoma admits that he never attended a meeting with Mercer, that no meeting took place between the presentation and his removal, and Mercer was "going to look at the organization and...see if it could be made more efficient...." **Exhibit J (Plaintiff's Depo.), pp. 135:20-136:6.**

Mercer's proposal for work, identified as Plaintiff's Exhibit 20, was simply that – a proposal for work that provided an estimate of cost. **Joint Pretrial Order, Plaintiff's Exh. 20, attached as Exhibit L.** Esse's testimony about payments made by SPPC to Mercer is also irrelevant and

1 hearsay. She testified, "I found a check issued to Mercer for about five hundred and seventy
 2 dollars; I don't remember how much it was." **Exhibit H (Esse Depo.), pp. 27:9-30:5; see also**
 3 **Exhibit E (Pena Depo.), p. 20:2-5.**

4 Buonanoma intends to use a portion of a consulting report prepared by Mercer to show
 5 "SPPC Human Resources Department's deficiencies," and that "Buonanoma's Department [was]
 6 adequate." **Joint Pretrial Order, Plaintiff's Exh. 7, 8.** The unreliable nature of these hearsay
 7 documents as to those points is explained by Jacqueline Kirkland's testimony. Ms. Kirkland was
 8 formerly employed by SPPC as a Human Resources representative, and is the only witness who has
 9 testified concerning Mercer's consulting reports. Notably, Buonanoma has not identified a Mercer
 10 employee or the individual who prepared these documents as a witness.

11 Statements by Mercer are not probative evidence of age discrimination and should be
 12 excluded. The alleged comments and documents prepared by Mercer are irrelevant to the claims at
 13 issue in this trial, and any probative value of such evidence is outweighed by the danger of unfair
 14 prejudice to SPPC. Moreover, such evidence would only serve to confuse the jury as to the relevant
 15 issue, i.e., whether Plaintiff was discriminated against because of his age in 2002. *See* Fed. R. Evid.
 16 402, 403, 602. They are also inadmissible hearsay. Fed. R. Evid. 802.

17 GRANTED: _____ DENIED: _____

18 **G. Motion *In Limine* To Exclude Argument Or Evidence Related To A Failure**
 19 **To Promote Claim By Buonanoma And His Alleged Resulting Damages.**

20 **1. The Evidence Is Time-Barred.**

21 In his Charges of Discrimination dated November 19, 2002, and February 18, 2003,
 22 Buonanoma alleged that SPPC discriminated against him by removing him from the Team Leader,
 23 Support Services position and terminating him in December 2002. **Exhibit N (Charges of**
 24 **Discrimination).** He did *not* allege that he should have been promoted to the Team Leader,
 25 Facilities position that Mitch Andreini was awarded, the Manager, Support Services position that
 26 Branch was awarded, or the Team Leader, Gas Distribution position. **Exhibit O (Buonanoma**
 27 **Affidavit) ¶¶ 2-5; Plaintiff's Exh. 27.** Thus, any such claim is time-barred. *See Jones v.*
 28 *Denver Post Corp.*, 203 F.3d 748, 754-55 (10th Cir. 2000) (dismissing plaintiff's claim for failure to

1 promote to position in February 1996 when charge of discrimination alleged claim for failure to
 2 promote to the same position in May 1996); *Dorsey v. Pinnacle Automation Co.*, 278 F.3d 830 (8th
 3 Cir. 2002); *Evans v. Comcast of Colorado*, 2007 U.S. Dist. LEXIS 53379 (D. Colo. 2007) (holding
 4 that the plaintiff could not pursue an age discrimination claim based upon the defendant's alleged
 5 failure to promote her to a position not asserted in her charge of discrimination).

6 The scope of a civil action alleging age discrimination is limited by the charge filed with the
 7 EEOC. *Albano v. Schering-Plough Corp.*, 912 F.2d 384, 386 (9th Cir. 1990) (citing 29 U.S.C. §
 8 626(d)), and *Limongelli v. Postmaster General*, 707 F.2d 368, 373 (9th Cir. 1983)). "Discrete acts
 9 such as termination, *failure to promote*, denial of transfer, or refusal to hire are easy to identify"
 10 and "[e]ach incident of discrimination and each retaliatory adverse employment decision constitutes
 11 a separate actionable 'unlawful employment practice.'" *National Railroad Corp. v. Morgan*, 536 U.S.
 12 101, 114 (2002)(*emphasis supplied*). Thus, "discrete discriminatory acts are not actionable if time
 13 barred, even when they are related to acts alleged in timely filed charges." *Id.* at 113. Instead,
 14 "[e]ach discrete discriminatory act starts a new clock for filing charges alleging that act." *Id.*

15 Buonanoma was required, but failed, to file his Charge within 300 days of these
 16 employment actions. See 29 U.S.C. §626(d); **Exhibit G (Branch's Depo.), Vol. I, pp. 19:12-**
 17 **24**. As a result, Buonanoma cannot now claim that he should have been promoted to any of these
 18 positions, or that he was paid less than Andreini due to discrimination, and any such argument or
 19 evidence should be excluded.

20 Further, Andreini's payroll records identified as Plaintiff's Exhibit 14, and any argument or
 21 other evidence of damages allegedly resulting from a time-barred event, should be excluded
 22 because Plaintiff may not collect damages for harm incurred in allegedly discriminatory events that
 23 are outside the limitations period. *Lyons v. England*, 307 F.3d 1092, 1112 (9th Cir. 2002)
 24 ("appellants may not sustain a cause of action for relief from present injury caused by time-barred
 25 acts"; *Walker v. Contra Costa County*, 2006 U.S. Dist. LEXIS 86339 *22 (N.D. Cal. 2006). Allowing
 26 such evidence creates the risk that the jury will do so.

27 ///

28 ///

2. The Evidence Is Not Relevant As Background Evidence.

In *National Railroad Passenger Corp. v. Morgan*, the United States Supreme Court held that discrete acts of discrimination that occur outside the statutory time period for filing a charge of discrimination are time-barred even if they are related to acts alleged in a timely-filed charge. *National Railroad Passenger Corp. v. Morgan*, 122 S. Ct. 2061 (2002). Based on the identification of Mitch Andreini as a witness and proposed exhibits in the Joint Pretrial Order, it appears that Plaintiff will be trying to admit evidence related to these time-barred promotional opportunities, presumably as "background" evidence under *Morgan*. **See Joint Pretrial Order, pp. 9, 13, and 14, Plaintiff's Exh. 14 (payroll records of Mitch Andreini), Exh. 27 (letter regarding Gas Distribution position), Exh. 29 (Job Applications for Team Leader, Facilities position), Exh. 31 (staffing evaluation forms doc. 2566-2569), Exh. 32 (staffing database), Exh. 33 (staffing summary form), Exh. 39 (application, evaluation and selection documentation Team Leader, Facilities).** This evidence should be excluded.

Ninth Circuit case law provides instruction as to when time-barred evidence may be admitted as background evidence in a discrimination case and makes clear that it would be inappropriate to allow Plaintiff to introduce evidence of the time-barred promotional opportunities at trial in this matter. In *Lyons v. England*, 307 F.3d 1092 (9th Cir. 2002), the Ninth Circuit directly addressed the issue of when time-barred events should and should not be admitted as background evidence in employment discrimination cases. It held that the determination of whether such evidence should be admitted is controlled by the Federal Rules of Evidence, including an appropriate application of the Rule 403 balancing process. *Id.* at 1110.

The Ninth Circuit in *Lyons* held that in the context of a racial disparate treatment claim, admissible background evidence must be relevant to determine "the ultimate question: whether the defendant intentionally discriminated against the plaintiff because of his race." *Id.* at 1110. In explaining this standard, the *Lyons* Court cited to the holding *Tennison v. Circus Circus Enterprises*, 244 F.3d 684 (9th Cir. 2001). In *Tennison*, the Ninth Circuit affirmed the district court's exclusion of testimony from coworkers that they had been harassed by the same employee as the plaintiffs, noting that district courts enjoy considerable discretion in determining whether to exclude evidence

1 under Rule 403 for unfair prejudice. *Id.* at 689-90. In *Tennison*, the district court ruled that the
2 prejudice to the employer outweighed the probative value of the evidence because admission of
3 the testimony might have resulted in a "mini trial" on the prior alleged acts. *Id.* at 690. The Ninth
4 Circuit in *Lyons* noted with approval that exclusion of the prior acts in *Tennison* was proper since
5 much of the information was disputed by the defendant and because (1) admission of the prior
6 time-barred acts would result in an inefficient use of the court's time and confusion to the jury, and
7 (2) admitting the evidence along with the employer's rebuttal evidence would create a significant
8 danger that the jury would base its assessment of liability on time-barred events. *Lyons*, 307 F.3d
9 at 1110 n.13.

10 Here, evidence related to the time-barred promotional opportunities should be excluded
11 pursuant to Federal Rule of Evidence 403 for the same reasons that the co-worker testimony was
12 excluded in *Tennison*. The probative value of evidence regarding the time-barred promotional
13 opportunities is insignificant compared to the potential for confusion for the jury and prejudice to
14 Defendant. There is no direct evidence concerning the time-barred promotional opportunities that
15 would tend to show that Plaintiff did not receive the promotions based upon his age or sex.

16 With respect to the Team Leader, Facilities position, the individual that was awarded the
17 position was 40 years old at the time and male. **Exhibit J (Plaintiff's Depo.), pp. 75:19-21,**
18 **163:24-164:1.** Andreini had held the Team Leader, Facilities position since 1997. Buonanoma,
19 on the other hand, was chosen for the Team leader, Support Services, position because he had
20 been a Coordinator supervising the same employees in the copy center, print shop and mail room,
21 and by his own admission, he "really didn't have to learn anything new," and "it was basically [his]
22 old job." ***Id.*, pp. 8:25-9:12, 65:16-24, 73:8-11, 76:16-77:25.** Thus, if Plaintiff were allowed
23 to present evidence pertaining to his belief that he was discriminatorily denied the 1999 promotion
24 as "background" for his timely claim, SPPC would need to present rebuttal evidence as to that
25 evaluation process, effectively resulting in a "mini trial," for the time-barred promotional
26 opportunity.

27 For the same reasons, evidence that Buonanoma should have been promoted to the Team
28 Leader, Gas Distribution position, or the Manager, Support Services position that Branch was

1 awarded should be excluded. Moreover, Buonanoma admits that he did not bid on the Manager
 2 position, **Exhibit J (Plaintiff's Depo.)**, pp. 11:16-12:1, 16:9-15, and Branch was 45 years old
 3 when she was awarded the Manager position.

4 Balancing all of the foregoing under Rule 403, it is clear that any minimal probative value of
 5 the disputed evidence regarding the time-barred promotional opportunities, the judicial inefficiency
 6 that would be caused by the admission of such evidence, and the danger of unfair prejudice to
 7 SPPC compel a finding that this evidence should be excluded at trial. *Walker v. Contra Costa*
 8 *County*, 2006 U.S. Dist. LEXIS 86339 *18-23 (N.D. Cal. 2006) (finding that evidence of time-barred
 9 events was not relevant to defendant's intent years later, and that "allowing plaintiff to prove the
 10 discriminatory nature of each incident would both consume undue time and eviscerate the statute
 11 of limitation"). As stated in *Walker*, "allowing Plaintiff to testify to the details of each incident, his
 12 belief that he had suffered discrimination, and the reasons for his belief would be unfairly
 13 prejudicial to the Defendants." *See Id.* at *22.

14 Defendant also anticipates that Plaintiff intends to offer evidence that Andreini attended a
 15 supervisory course and that his pay was higher than Buonanoma's pay. Andreini's testimony and
 16 his payroll records should be excluded because Andreini was not "similarly-situated" to Buonanoma.
 17 *Hamilton v. Sears Roebuck & Co.*, 2008 U.S. Dist. LEXIS 14447 *21 (D. Nev. 2008), *citing*, *Vasquez*
 18 *v. County of Los Angeles*, 349 F.3d 634, 641-42 (9th Cir. 2003). Also, the evidence shows that
 19 Buonanoma *was enrolled in* a supervisory course, and Buonanoma admits that Andreini had been a
 20 Team Leader since 1997 before taking on both "inside" and "outside" Facilities as the "Manager" of
 21 the Facilities department, while Buonanoma was a Coordinator prior to his promotion to Team
 22 Leader. **Exhibit P (Defendant's Exh. 406, bates 2004-2005); Exhibit Q (Defendant's Exh.**
 23 **443, bates 2131); Exhibit J (Plaintiff's Depo.)**, pp. 7:21-8:7, 8:25-9:4, 73:19-74:6.
 24 Plaintiff and his counsel should not be permitted to dream up irrelevant and prejudicial last minute
 25 issues which will greatly lengthen the trial and confuse the jury.

26 GRANTED: _____

DENIED: _____

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28 ///

1 **H. Motion *In Limine* To Exclude Argument Or Evidence Of Alleged Rumors,**
 2 **Discrimination Complaints Or Lawsuits By Other Employees, Or**
 3 **Compromise Negotiations Between SPPC And Other Employees Or An**
 4 **Agency.**

5 SPPC anticipates that Plaintiff will seek to elicit testimony from Mitch Andreini, Patrizia Esse,
 6 Mary Jean Snow and Marie Stuersel regarding unrelated lawsuits and/or compromise negotiations
 7 between these former employees and SPPC. These lawsuits have no relevance to the current case
 8 except to cause the jury to form a negative view of SPPC. Fed. R. Evid. 402. The high risk of
 9 unfair prejudice, confusion of the issues, and misleading the jury outweighs any potential probative
 10 value. Fed. R. Evid. 403. Evidence of any compromise negotiations between SPPC and these
 11 former employees or an agency is barred by Fed. R. Evid. 408.

12 Pena was questioned generally about the number of pending claims against the company.
 13 **Exhibit E (Pena Depo.), p. 34-35.** There is no evidence of the allegations asserted in these
 14 claims. He and Kirkland were questioned about an agreement between SPPC and the DOL, and
 15 Kirkland was also questioned about an investigation by the DOI where the company was not found
 16 to be at fault. ***Id.* at p. 40-43, 45-46; Exhibit D (Kirkland Depo.), pp. 143:25-145:22.**
 17 There is no evidence of the specific terms of the agreement. The agreement is not identified as an
 18 exhibit in the Joint Pretrial Order. Gloria Banks Weddle testified that she was deposed in other
 19 discrimination lawsuits or charges of discrimination against SPPC. **Exhibit I (Weddle Depo.), p.**
 20 **6:15-18, 16:15-17:9, 18:13-19:3.** There is no evidence of the specifics of the lawsuits. Such
 21 testimony is hearsay and irrelevant and any potential value is outweighed by the risk of unfair
 22 prejudice.

23 Andreini resigned in July 2006, four years after Plaintiff's termination, and filed suit in April
 24 2008, six years after Plaintiff's termination. Andreini was the Manager of the Facilities Department.
 25 Mary Jean Snow was terminated in September 2007, five years after Plaintiff's termination. Snow
 26 was a Manager in the Distribution of Design Department. Esse was terminated in March 2004,
 27 more than a year after Plaintiff's termination. Esse was an accountant and later worked in the tax
 28 department. **Exhibit H (Esse Depo.), pp. 10:6-8, 13:5-8.** Esse alleged that she was treated
 less favorably than male employees, the opposite of Buonanoma's allegations. Because these

1 employment decisions are entirely unrelated to Buonanoma's employment, any evidence of their
 2 complaints or lawsuits, which assert only allegations, against SPPC should be excluded. *Chirido v.*
 3 *Minerals Technologies, Inc.*, 2009 U.S. Dist. LEXIS 51466 *3 (E.D. Pa. 2009), *citing, Sprint/United*
 4 *Mgmt. Co. v. Mendelsohn*, 552 U.S. 379 (2008) (the probative value of the testimony of another
 5 former employee did not outweigh the danger of prejudice of testimony regarding the facts of his
 6 employment discrimination case, which were "particularly acute" here because he had settled his
 7 lawsuit with the defendants).

8 For similar reasons, evidence of other complaints of discrimination should be excluded
 9 because it is irrelevant and the prejudice to SPPC is outweighed by any probative value. Fed. R.
 10 Evid. 402, 403. Specifically, SPPC moves to exclude such testimony from the following witnesses
 11 identified by Plaintiff: Rod Sloan, Sarah Britt, Suzanne Brown, Mitch Andreini, Patrizia Esse,³ Mary
 12 Jean Snow and Marie Stuersel. Not only were Sloan, Britt, and Brown disclosed late, testimony by
 13 these witnesses, in addition to Andreini, Snow, and Stuersel is irrelevant to Plaintiff's individual
 14 disparate treatment claim and unfairly prejudicial, and would tend to confuse the jury into believing
 15 it could hold SPPC liable for other acts of alleged discrimination beyond those asserted in this
 16 lawsuit. If Plaintiff is allowed to elicit testimony that these individuals believe they or other
 17 employees were similarly discriminated, SPPC will be forced to submit evidence to rebut their
 18 allegations, creating numerous "mini-trials."

19 None of these witnesses were supervised by Angela Branch, nor were they employed in the
 20 Support Services Department. None of them had jobs similar to the Plaintiff. None of them
 21 engaged in conduct similar to Plaintiff's poor performance that resulted in his removal from the
 22 Support Services position. Accordingly, this evidence is irrelevant to Plaintiff's claim as it involves
 23 completely different circumstances and unfairly prejudices SPPC. As such, this "me too" type of
 24 testimony should be excluded. *Guinan v. Potter*, 307 Fed. Appx. 92, 2009 U.S. App. LEXIS 2391
 25 (9th Cir. 2009), *citing, Sprint/United Mgmt. Co. v. Mendelsohn*, 552 U.S. 379 (2008) (district court
 26 properly excluded testimony by nonparties who alleged discrimination by supervisors who were not
 27 involved in the decisions by requiring that "similarly situated" employee-witnesses "have similar

28 ³ **Exhibit H (Esse Depo.), pp. 38:15-46:16; Exhibit R (Stuersel Depo.), pp. 5:2-12.**

1 jobs and display similar conduct" to the plaintiff).

2 For example, Brown was a clerical employee in the Facilities department, and the
3 circumstances surrounding Brown's termination are completely different than the events that lead
4 to Plaintiff's termination. In other litigation, Brown admitted in her deposition that she has a
5 problem with alcohol and that she was terminated as a result for violating the company's drug and
6 alcohol policy by testing positive for alcohol use on *three occasions*. **Exhibit S (Brown's Depo.),**
7 **98-103, 111-115, 121-123.** Brown admitted, "I knew that I was in trouble." When asked
8 whether she understood that testing positive for alcohol over a level of .02 was a violation of
9 company policy, she testified, "absolutely." ***Id.* at pp. 102-103.**

10 Also, SPPC anticipates that Plaintiff intends to present testimony by Rod Sloan that he was
11 not promoted to the Team Leader, Support Services position in 2006 due to his age, and testimony
12 that Ralph Negron, Rachel Bixby and Joanne Osborne were hired due to their age. Sloan applied
13 for the company's *voluntary severance program* and retired in December 2009. Unlike Buonanoma,
14 he was not terminated. Thus, testimony by these employees is irrelevant for the additional reason
15 that Buonanoma has not asserted either failure to hire or failure to promote claims. Promotional
16 and hiring decisions are completely unrelated to how discipline is determined. *McDole v. City of*
17 *Saginaw*, 2008 U.S. Dist. LEXIS 107273 *7-9 (E.D. Mich. 2008), *citing, Sprint/United Mgmt. Co. v.*
18 *Mendelsohn*, 552 U.S. 379 (2008) (holding that hiring and promotion practices were not probative
19 of whether race motivated defendant's decision to terminate plaintiff, and allowing plaintiff to
20 litigate the issue of whether defendant had discriminatory hiring or promotion practices was likely
21 to confuse the jury as to the issues in the case).

22 Further, Plaintiff will contend that Suzanne Brown was discriminated against in 2008, *six*
23 *years* after Plaintiff's termination, that Sarah Britt was discriminated against in 2006, *four years*
24 after Plaintiff's termination, and that Rod Sloan was discriminated against in 2004, *two years* after
25 Plaintiff's termination. These events are too remote in time from, and occurred years after, the
26 alleged discrimination in this case. Ralph Negron was hired for the Team Leader, Facilities position
27 in 2006, and therefore, any testimony by Mr. Negron has no relevance to this case since Plaintiff
28 was terminated in 2002, Plaintiff was never employed in that position, and Plaintiff is not

1 contending that he should have been awarded that position over Mr. Negron. Rachel Bixby became
 2 a Services Coordinator in the Facilities Department in November 2007, which is not in any way
 3 relevant to Plaintiff's termination from a position in the Support Services Department five years
 4 earlier. Also, Angela Branch, Plaintiff's supervisor, played no role in the employment decisions
 5 affecting Brown, Britt, Negron or Bixby.

6 Joanne Osborne replaced Cathy Palmer in 2004, three years after Plaintiff was removed
 7 from the Team Leader position. Osborne's placement into the Team Leader position is also too
 8 remote in time, and any evidence related to Osborne should be excluded. *Gutknecht v. Smithkline*
 9 *Beecham Clinical Laboratories, Inc.*, 950 F. Supp. 667, 674, n. 7 (E.D. Pa. 1996), *aff'd*, 135 F.3d
 10 764 (3rd Cir. 1997). In rejecting plaintiff's argument that he satisfied a *prima facie* case because a
 11 younger employee assumed his duties one year after his termination, as the court in *Gutknecht*
 12 stated, "If plaintiff's argument is taken to its logical extreme, the duties of a terminated employee
 13 will always become the responsibility of a younger employee when looking far enough into the
 14 future." *Id.* at p. 674, n. 7; *Densmore v. Hoffmann-La Roche Ins.*, 1991 U.S. Dist. LEXIS 14359 *3-
 15 4 (E.D. Mich. 1991) ("the fact that a younger worker eventually replaced plaintiff, and this was not
 16 until after the plaintiff had exhausted her sick leave, is insufficient to state a *prima facie* case of age
 17 discrimination").

18 Finally, Esse's testimony is purely speculative. Fed. R. Evid. 602. She testified that she
 19 would "see in the accounting department, the supervisors which were of a certain age got all (sic)
 20 substituted, but I think by younger people at that particular point in time." **Exhibit H (Esse**
 21 **Depo.), pp. 19:12-20:3.** Esse admits, "Perhaps they didn't have length of employment in that
 22 position; I don't know." ***Id.* at p. 19, 22-24.** She also admits that she was "mak[ing] an
 23 assumption." ***Id.* at p. 19:15.** Further, Esse testified that she is not aware of any employee that
 24 was fired because of their age. **Exhibit H (Esse Depo.), p. 48:17-22.**

25 Also, Victor Pena was questioned about alleged rumors that he used the word "nigger" and
 26 was asked to resign. **Exhibit E (Pena Depo.), p. 31.** Any evidence or argument concerning
 27 alleged rumors should also be excluded. Buonanoma's reverse race discrimination claim was
 28 dismissed by this Court, and the Ninth Circuit Court of Appeals upheld the dismissal of that claim.

1 Evidence or argument of speculative rumors are inadmissible hearsay, and irrelevant to
 2 Buonanoma's remaining claims, and they would be irrelevant to his reverse race discrimination
 3 claim in any event. Kirkland was questioned by Plaintiff concerning other internal complaints of
 4 discrimination, testimony concerning alleged pay discrimination and sexual harassment, and
 5 settlement negotiations in another unrelated matter, which are not at issue here and should also be
 6 excluded. **Exhibit D (Kirkland Depo.), p. 90:19-95:19, 194:22-197:21.**

7 Defendant will appear at trial prepared to try the case of Dennis Buonanoma. Defendant
 8 should not be required to spend weeks trying other cases and any testimony concerning complaints
 9 or lawsuits by, or settlement negotiations with, Andreini, Esse, Snow, Sloan, Britt, Brown should be
 10 excluded. Similarly, testimony by Bixby, Negron and Osborne should be excluded. Fed. R. Evid.
 11 402, 403, 602, 802.

12 GRANTED: _____ DENIED: _____

13 **I. Motion *In Limine* Re "Google" And Alleged Stigma.**

14 SPPC also moves for an order precluding Plaintiff from introducing any evidence, or from his
 15 counsel commenting in opening statement or closing argument that he remains unable to find
 16 employment because there is a stigma related to leaving SPPC or because prospective employers
 17 "Google" his name (or use any other search engine) and see that he filed the instant lawsuit, or in
 18 any other manner informing the jury that a record of this litigation is accessible through "Google" or
 19 any other search engine. Plaintiff testified that he "believes" that there is a stigma attached to
 20 employees who leave SPPC. **Exhibit J (Plaintiff's Depo.), p. 22:10-23:21.** His testimony is
 21 irrelevant, speculative and inadmissible hearsay. Fed. R. Evid. 402, 403, 602, 802.

22 Plaintiff also attempts to explain his inability to find employment on alleged retaliation by
 23 prospective employers who allegedly "Google" his name and see that he filed the present lawsuit
 24 against Defendant. In the deposition of Terrance Dinneen, Buonanoma's counsel questioned Mr.
 25 Dinneen as to whether Dr. Carroll's report differentiates between "the re-employment rate of
 26 persons who are suing their former employer versus persons who are not suing their former
 27 employer." **Exhibit T (Dinneen Depo.), p. 97:15-19.** This evidence should be excluded for
 28 several reasons.

1 First, it is well settled that a plaintiff may not, in the very same action, seek recovery against
 2 the defendant for damages allegedly arising out of the litigation process itself. For instance, courts
 3 have held that a plaintiff may not sue a defendant and then attempt to recover damages for
 4 emotional distress brought on by that lawsuit. *Blakey v. Continental Airlines, Inc.*, 992 F. Supp.
 5 731, 736 n.3 (D. N.J. 1998) (holding that plaintiff in hostile work environment case could not
 6 recover from emotional distress caused by the litigation); *Timms v. Rosenblum*, 713 F. Supp. 948,
 7 955 (E.D. Va. 1989) (noting the "wisdom" of precluding recovery for mental anguish stemming
 8 from the litigation process). Here, Plaintiff attempts to seek lost earnings against Defendant
 9 claiming, in part, that employers will not hire him because a computer search engine reveals this
 10 lawsuit. He should be precluded from introducing this evidence or asserting this argument in the
 11 opening statement or closing argument because he cannot recover damages allegedly incurred as a
 12 result of the litigation he initiated.

13 Second, Rule 403 limits the admissibility of otherwise relevant evidence when countervailing
 14 factors "substantially outweigh" its probative value. Fed. R. Evid. 403. The countervailing factors
 15 include the danger of unfair prejudice, confusion of the issues, misleading the jury, considerations
 16 of undue delay, waste of time, and needless presentation of cumulative evidence. *Id.* Admission
 17 of this evidence would certainly result in the jury punishing Defendant for the alleged retaliation by
 18 prospective employers. Indeed, to the extent that Plaintiff has evidence, *i.e.* more than mere
 19 speculation, that a prospective employer denied his employment because it learned of this lawsuit
 20 via a "Google" search, then the proper remedy is a retaliation action against that employer - not an
 21 award against Defendant.

22 Finally, Federal Rule of Evidence 602 precludes testimony from witnesses who do not have
 23 personal knowledge about the testimony given. Even if "Googling" Plaintiff's name reveals this
 24 lawsuit, because Plaintiff was never told by a prospective employer that he was denied employment
 25 for that reason, such testimony is based on speculation.⁴ Fed. R. Evid. 602.

26 GRANTED: _____

DENIED: _____

27 _____
 28 ⁴ If Plaintiff was told he was denied employment for this reason, that testimony should be precluded because,
 among other reasons, it is hearsay. Fed. R. Evid. 802.

J. Evidence Of Economic Damages Should Be Excluded; Front Pay Is An Equitable Remedy For The Court To Determine Under Both The ADEA And Title VII, And Back Pay Is An Equitable Remedy For Title VII Purposes.

Plaintiff claims that he was discriminated against by being removed from the Team Leader, Support Services position and ultimately terminating his employment. Even if the jury finds for Plaintiff on his ADEA and Title VII claims, the Court and not the jury must determine whether to award him the equitable remedy of front pay and, if so, the amount of any such award. *See, e.g., Traxler v. Multnomah Co.*, 596 F.3d 1007 (9th Cir. 2010). Further, for purposes of Plaintiff's gender discrimination claim under Title VII, it is the Court's job to determine any back pay to be awarded to the Plaintiff. *See, e.g., Lutz v. Glendale Union High Sch. Dist. No. 205*, 403 F.3d 1061 (9th Cir. 2005).

In *Traxler*, the Ninth Circuit explained that, for purposes of employment-related statutes, including the FMLA, ADEA and Title VII, front pay is an equitable remedy which is determined by the Court. *See Traxler*, 596 F.3d 1007 at *8-11 ("The characterization of front pay as an equitable remedy is consistent with the general nature of front pay in the context of other employment-related statutes."); *accord Pollard v. E.I. du Pont de Nemours & Co.*, 532 U.S. 843, 853 n.3 (2001) (citation omitted) (observing, in the context of Title VII, that "[a] front pay . . . award is the monetary equivalent of the equitable remedy of reinstatement"). Because front pay is a "proxy for reinstatement", the Ninth Circuit explained that that awards of front pay are "equitable award[s] within the purview of the court, not the jury." *Traxler*, 596 F.3d 1007 at *9. The Ninth Circuit went on to explain that "[n]early all of the circuits that have considered front pay under the ADEA treat the remedy as wholly equitable, leaving both the availability and amount of front pay to the court." *Id.* at * 12 (citing *Newhouse v. McCormick & Co.*, 110 F.3d 635, 643 (8th Cir. 1997), *Denison v. Swaco Geolo-graph Co.*, 941 F.2d 1416, 1426-27 (10th Cir. 1991); *Duke v. Uniroyal Inc.*, 928 F.2d 1413, 1424 (4th Cir. 1991); *Fortino v. Quasar Co.*, 950 F.2d 389, 398 (7th Cir. 1991); *Deloach v. Delchamps, Inc.*, 897 F.2d 815, 823 & n.4, 824 (5th Cir. 1990); *Ramsey v. Chrysler First, Inc.*, 861 F.2d 1541, 1545 (11th Cir. 1988); *Dominic v. Consol. Edison Co. of N.Y., Inc.*, 822 F.2d 1249, 1257-58 (2d Cir. 1987)). Accordingly, for purposes of Plaintiff's Title VII and ADEA claims, any award of front pay must be decided by the Court and not the jury.

1 Similarly, should the jury find in favor of the Plaintiff on his Title VII gender discrimination
 2 claim, it is the Court that must determine any back pay to be awarded under that statute. In *Lutz*,
 3 the Ninth Circuit held "that there is no right to have a jury determine the appropriate amount of
 4 back pay under Title VII, . . . even after the Civil Rights Act of 1991." *Lutz*, 403 F.3d 1061 (9th Cir.
 5 2005). There, the court allowed the jury to determine whether to award back pay and the amount
 6 of the award. Although the Court of Appeals found that the plaintiff had appropriately requested a
 7 jury trial on the issue of back pay, it agreed with the defendant's position that "back pay is a matter
 8 for resolution by the court, not an issue triable of right by a jury." *Id.* Thus, under *Lutz*, even if
 9 liability is found, "the district court must exercise its discretion to determine an appropriate amount
 10 of back pay, if any." *Id.*

11 The Court should preclude Plaintiff from presenting any evidence or otherwise referring to
 12 front pay or back pay under Title VII in the presence of the jury because these are equitable
 13 remedies that the Court should decide outside the presence of the jury. Further, Plaintiff and his
 14 counsel should not be permitted to present any evidence or make any reference to front pay under
 15 the ADEA claim.

16 GRANTED: _____

DENIED: _____

17 **K. Motion *In Limine* To Exclude Evidence Of Sppc's Net Worth.**

18 In his First Amended Complaint, Plaintiff seeks an award of punitive damages. **First**
 19 **Amended Complaint, Doc. No. 19.** Evidence of a defendant's net worth is not admissible until
 20 after a plaintiff establishes a *prima facie* case for punitive damages. *999 v. C.I.T. Corp.*, 776 F.2d
 21 866, 872 (9th Cir. 1985). Otherwise, such evidence is distracting and prejudicial. *Id.* (citing *Geddes*
 22 *v. United Financial Group*, 559 F.2d 557, 560 (9th Cir. 1977)). Thus, SPPC requests an order
 23 precluding Plaintiff from introducing any evidence regarding SPPC's net worth until, and if, Plaintiff
 24 establishes a *prima facie* case for punitive damages.

25 GRANTED: _____

DENIED: _____

26 ///

27 ///

28 ///

L. Motion *In Limine* To Exclude Any Testimony or Evidence From An Expert Not Properly Disclosed.

Federal Rule of Civil Procedure 26(a)(2)(A) requires a party to disclose "the identity of any person who may be used at trial to present evidence under Rules 702, 703, or 705 of the Federal Rule of Evidence." Fed.R.Civ.P. 26(a)(2)(A). Under Rule 26(a)(2)(B), the expert disclosure must be accompanied by a written report.

For the first time in the Joint Pretrial Order, Buonanoma identified an expert report prepared by Navigant Consulting, Inc. in an unrelated matter, *Andreini and Belles v. SPPC*, 3:08-cv-00179-LRH-VPC. Buonanoma failed to identify the expert who prepared the report as an expert witness who may be used at trial pursuant to Rule 26(a)(2)(A). **Exhibit U (Plaintiff's Designation of Expert Witnesses and Reports)**. Buonanoma also failed to disclose the written report pursuant to Rule 26(a)(2)(B). Buonanoma has never disclosed Navigant as an expert, nor did he produce the report by the discovery deadline.

Exclusion is an appropriate remedy for failing to fulfill the required disclosure requirements of Rule 26(a). *Yeti by Molly, Inc. v. Deckers Outdoor Corp.*, 259 F.3d 1101, 1106 (9th Cir. 2001); Fed.R.Civ.P. 37(c). Because Buonanoma failed to designate this expert witness or disclose the report pursuant to Rule 26(a)(2)(A) and (B), he should be precluded from offering any testimony by this expert or the report prepared for another matter pursuant to Rules 702, 703, and 705.

GRANTED: _____

DENIED: _____

III. CONCLUSION

For the foregoing reasons, Defendant respectfully requests that the Court grant its motions *in limine* set forth above.

Dated: August 13, 2010.

LITTLER MENDELSON, P.C.

By: _____/s/

PATRICK H. HICKS, ESQ.

KARYN M. TAYLOR, ESQ.

Attorneys for Defendant
SIERRA PACIFIC POWER CO.

PROOF OF SERVICE

I, TARYN CIARDELLA, hereby declare and state:

I am over the age of eighteen years, employed by NV Energy in the County of Washoe, Nevada, and not a party to the within action. My business address is 6100 Neil Road, Reno, Nevada 89511.

On August 13, 2010, I served the **DEFENDANT SIERRA PACIFIC POWER COMPANY'S FIRST SET OF MOTIONS *IN LIMINE*** on the following by filing electronically through CM/ECF:

**ANNE M. VOHL, ESQ.
One East Liberty Street, 6th Floor
Reno, NV 89504**

**Fred Hill Atcheson, Esq.
Nevada Bar No. 0135
P.O. Box 8292 University Station
Reno, NV 89507**

I declare under penalty of perjury that the foregoing is true and correct. Executed on August 13, 2010 at Reno, Nevada.

/s/
TARYN CIARDELLA